

NO. 50281-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

THORMOD SKALD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Leila Mills, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's conviction for felony harassment violates the First Amendment because the State failed to prove his statements amounted to a true threat.

2. Insufficient evidence supports the conviction for felony harassment because the State failed to prove the complaining witness, Asta Gunnlaugsdottir, was placed in reasonable fear that she would be killed.

Issues Pertaining to Assignments of Error

1. To avoid violating the First Amendment's protection of free speech, statutes proscribing threatening speech must be limited to true threats that would, considering the circumstances, reasonably be foreseen as serious expressions of intent to carry out the threat. Appellant was convicted of one count of felony harassment for making a remark about shooting his ex-wife, Asta Gunnlaugsdottir, in the presence of two employees with whom he shared a "morbid and macabre" sense of humor. 1RP<sup>1</sup> 94-95, 124. Both employees acknowledged they had interpreted prior similar statements made by appellant as hyperbole. Was the evidence insufficient to show that a reasonable person under these circumstances would have foreseen that appellant's comments were a

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – January 23, 24, 25, and 26, 2017; 2RP -- February 17, 2017.

serious expression of intent to kill Gunnlaugsdottir, rather than idle talk or hyperbole?

2. Appellant never communicated his alleged statements about shooting Gunnlaugsdottir to her directly. Similarly, neither employee who heard the alleged statements conveyed them to Gunnlaugsdottir. Rather, Gunnlaugsdottir only learned about some of appellant's alleged statements from speaking directly with the investigating police officer. Appellant and Gunnlaugsdottir were separated at the time and she was living in Iceland. Is the evidence insufficient to prove Gunnlaugsdottir was placed in reasonable fear that the threat to kill would be carried out where there was no history of physical violence between her and appellant, the specific statements conveyed from the detective to Gunnlaugsdottir about what appellant allegedly said were not admitted at trial, and Gunnlaugsdottir testified only that she took what appellant said, "very seriously". 1RP 145-46.

B. STATEMENT OF THE CASE

1. Procedural History.

The Kitsap County prosecutor charged appellant, Thormod Skald, with three counts of felony harassment – domestic violence, for three statements allegedly made between January 1, 2015 and August 30, 2016. CP 7-11; 1RP 3-6.

The first charged incident alleged that Skald threatened to kill his ex-wife, Asta Gunnlaugsdottir, with poison extracted from rosary beads, and placed her in reasonable fear that the threat to kill would be carried out. The second charged incident alleged that Skald threatened to kill Gunnlaugsdottir with dimethylmercury poisoning, and placed her in reasonable fear that the threat to kill would be carried out. The final charged incident, alleged that Skald threatened to kill Gunnlaugsdottir with a shotgun, and placed her in reasonable fear that the threat to kill would be carried out. CP 7-11; 1RP 197, 200-05.

A jury did not reach a verdict on the first two charged incidents. 1RP 239, 245. The jury found Skald guilty of the third charged count of felony harassment -- domestic violence. 1RP 239-42; CP 42-54. The State subsequently dismissed the first two charges at sentencing, explaining it was "not going to pursue those charges after he's [Skald] is sentenced on this one [count 3]". 2RP 6-7.

Based on an offender score of zero, the trial court sentenced Skald to three months imprisonment, with Skald eligible to serve the time on sentencing alternatives. 2RP 18; CP 42-54. The trial court also imposed a five year no contact order between Skald and Gunnlaugsdottir, with incidental contact permitted in order to set up electronic visitation between Skald and his children. 2RP 18-19. Skald timely appeals. CP 56-69.

2. Trial Testimony.

Skald and Gunnlaugsdottir met in her home country of Iceland in 2006. They moved to the United States together in 2007, were married, and had two children. 1RP 141, 150. In 2010, Skald and Gunnlaugsdottir started an ice cream business. 1RP 142.

Skald hired Anjela Hasseries, Amber Golding, and Heather Uhling, as employees of the ice cream business. 1RP 84, 117, 161. Neither Hasseries nor Golding ever met or spoke with Gunnlaugsdottir. 1RP 85, 103, 117-20, 142-43.

Gunnlaugsdottir became increasingly depressed and isolated as her marriage with Skald continued. Gunnlaugsdottir described Skald as “controlling” and having a bad temper that resulted in him using “pretty bad words” when he felt confronted. 1RP 143-44, 148, 153. Skald never caused Gunnlaugsdottir any physical injury and never threatened her. 1RP 152-53.

Gunnlaugsdottir traveled to Iceland in 2014 in hopes of securing a loan for the ice cream business. 144-45, 151. After the loan was denied she decided she wanted to stay in Iceland and filed for divorce from Skald. 1RP 145. The divorce was finalized in 2015, but decisions on whether Skald or Gunnlaugsdottir would retain primary custody of the children remain unresolved. 1RP 85, 98, 118, 125, 131, 145, 148.



Both Hasseries and Golding testified positively on Skald's behalf during the ongoing custody dispute. 1RP 85, 93-94, 131-33. Beginning in 2015, Skald began talking "constantly" about Gunnlaugsdottir. 1RP 86. He said that he would "be damned" if Gunnlaugsdottir left with their children again. 1RP 122-23, 129. Skald and Hasseries "joke[d]" about how hiring a hitman would be cheaper than hiring a lawyer. 1RP 86, 98-99. Hasseries, dealing with medical issues of her own, also joked about driving herself and Gunnlaugsdottir off a cliff. 1RP 95-98. As Hasseries explained, "It was something that – you know, a person would blow off steam. He [Skald] was going through a lot at the time. So we would say it, we would laugh, and then we would move on." 1RP 98-99.

In March 2016, Skald contacted Golding and asked if she knew anything about a plant that was used to make rosary beads. Skald said that he wanted figure out a way to extract the poison from the plant and use it to poison Gunnlaugsdottir. 1RP 118-19, 123-24. The comment was a "red flag" for Golding. 1RP 119. As Golding explained however, "I thought maybe he [Skald] was upset because he had lost the custody case, and so I just kind of filed it away and, you know, thought – tried to brush it off." 1RP 119.

Sometime in July 2016, Skald asked Golding and Hasseries if they knew anything about chemistry. Skald explained that he had read an

article where someone got dimethylmercury on their skin and the person died a short time later. 1RP 87, 120-21, 127. When Hasseries started to look up dimethylmercury on her cellphone, Skald told her not to because he did not want any of his friends connected. 1RP 87-88. Although “it became apparent that he [Skald] couldn’t get dimethylmercury[,]” Golding “kind of started to worry,” because Skald had researched the substance. 1RP 121.

In August 2016, Skald commented to Golding and Hasseries that he would just shoot Gunnlaugsdottir with a shotgun in the parking lot of the courthouse when she appeared for a custody hearing. 1RP 86-87, 100, 121-22, 129. Golding never told Skald he should stop talking about killing Gunnlaugsdottir. 1RP 125. Golding also did not report any of Skald’s comments to police. 1RP 125-28. In particular, Golding did not report Skald’s comments about shooting Gunnlaugsdottir to police because she knew that Gunnlaugsdottir was in Iceland. 1RP 128.

Hasseries contacted police after being urged to do so by her therapist. 1RP 90, 101-03. Detective David Shurick interviewed Hasseries over the phone. 1RP 111-14. Shurick also spoke with Skald, Golding, and Gunnlaugsdottir. 1RP 112, 115. Shurick told Gunnlaugsdottir “what [he] had learned during [his] investigation.” 1RP 112-13. Gunnlaugsdottir took Skald’s statements “very seriously”. 1RP

145-46. Shurick also collected a shotgun and shells from Skald's home. 1RP 113.

Hasseries explained that she began taking Skald's threats seriously once he developed a plan around June 2016. 1RP 90, 101-04. She testified that she believed had not she reported Skald's comments to police there was a good chance Gunnlaugsdottir would be dead. 1RP 91-92. Nonetheless, Hasseries acknowledged she had previously stated she was uncertain whether Skald had a specific intent to harm Gunnlaugsdottir. 1RP 92-93.

Golding did not believe Skald was joking when he made statements about harming Gunnlaugsdottir because Skald had thought out the various plans and researched them. 1RP 122. Golding could not say whether Skald really intended to carry out his threats or was "just blowing off steam[.]" 1RP 123-25.

Uhling denied that she had ever heard Skald threaten Gunnlaugsdottir. 1RP 164. Uhling explained that Skald had a dark sense of humor. 1RP 164. Although Skald seemed anxious and stressed, she did not believe that he was angry toward Gunnlaugsdottir. 1RP 163-64. Uhling explained that Skald told her Gunnlaugsdottir most likely would not appear personally at the custody hearing in September. 1RP 165.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT SKALD OF FELONY HARASSMENT BECAUSE THE STATE FAILED TO PROVE SKALD'S STATEMENT ABOUT SHOOTING GUNNLAUGSDOTTIR WAS A TRUE THREAT.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013). Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a “true threat” so as not to violate the First Amendment’s free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001).

A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression to inflict bodily harm or to take a life. Kilburn, 151 Wn.2d at 43. Communications that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener.

State v. Johnston, 156 Wn.2d 355, 361, 127 P.3d 707 (2006). "[T]he relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke." Kilburn, 151 Wn.2d at 46; See also State v. Trey M., 186 Wn.2d 884, 906-07, 383 P.3d 474 (2016) (affirming standard set forth in Kilburn).

Here, the jury was instructed that, "to be a threat, a statement or act must occur in the context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk." CP 27 (instruction 9). During closing argument, the prosecutor specifically told the jury that Skald's alleged threat to shoot Gunnlaugsdottir with a shotgun was the act they should rely on to find Skald guilty of the third charged felony harassment charge. 1RP 197, 205.

In light of this jury instruction, and the prosecutor's election, the State was required to prove that Skald's alleged comment that he was going to shoot Gunnlaugsdottir with a shotgun, made in the presence of Hasseries and Golding, was a true threat. Considering the context in which the comment was made, Skald's statement was not a true threat.

When the First Amendment true threat analysis is implicated, reviewing courts independently examine the record to ensure that protected speech is not penalized. Kilburn, 151 Wn.2d at 50-52 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). This analysis demands more than the application of the standard of review for examining the sufficiency of the evidence. Kilburn, 151 Wn.2d at 48-49. While not amounting to full de novo review, the court has a “special responsibility” to independently review the crucial facts relating to whether speech is protected. Id. The true threat analysis includes consideration of the entire context of the statement, including facts ignored by a lower court. Kilburn, 151 Wn.2d at 47, 51.

Even if the plain meaning of the words used may appear to be a threat, the words may not amount to a true threat based on the context. For example, in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the court held the N.A.A.C.P. chairman’s speeches, although the words purported to threaten violence, were protected speech because no harm actually resulted and because they were part of the passionate and highly charged political rhetoric of the civil rights movement. Id. at 926-29.

Similarly, in the case that gave rise to the definition of a true threat, Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), Watts declared during a group discussion at an antiwar rally, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Watts and the others laughed after he made his statement. The U. S. Supreme Court reversed Watts’ conviction for threatening the president, concluding that taken in context and considering the reaction of the listeners the statement was not a true threat. Id. at 706-08.

More recently, in Kilburn, the Washington Supreme Court reversed a conviction for harassment based on a threat made to a school classmate. 151 Wn.2d at 38-39. In that case, K.J. came to school and told a friend, “I’m going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first.” Id. at 39. The friend thought he might be joking but was not sure. Id. As she thought about it more, she began to fear he was serious and told her parents, who called 911. Id. Despite the inherently alarming nature of K.J.’s statements, the court found insufficient evidence of a true threat. Id. at 54.

First, the court noted that K.J. had stated he was only joking and the trial court found him credible. Id. at 52. He testified that when he made the statement, he was with a group of students standing around chatting and giggling about a book involving guns and the military. Id. at

52. The friend confirmed that after he made the statement, K.J. began giggling as if he were not serious. Id. at 52. The friend testified that, at the time, she was not scared, but only surprised because, in the two years she had known him, K.J. had always treated her nicely. Id. at 52. Based on these facts, the court concluded that a reasonable person in K.J.'s position would not reasonably foresee that the threat would be taken seriously. Id. at 53.

Kilburn mandates that courts consider the context in which the statements were made, the person or persons to whom the statements were made, and the relationships between the persons. 151 Wn.2d at 47, 51. When these facts are taken into account here, the evidence shows a reasonable person would not foresee that Skald's statement to Hasseries and Golding included a serious expression to kill Gunnlaugsdottir.

Hasseries and Golding worked for Skald and knew he had a dark sense of humor. 1RP 94-95, 124. Hasseries in particular, had a "buddy-buddy" relationship with Skald that included a shared "morbid and macabre" sense of humor. 1RP 94-95. As Hasseries explained, she and Skald would "kind of feed off each other" to see "who could tell the most sick joke". 1RP 94-95.

Both women also knew that Skald was in the midst of a difficult divorce and child custody dispute with Gunnlaugsdottir. On more than



one occasion, Hasseries and Skald "joke[d] that it would be cheaper to hire a hitman than a lawyer[.]" 1RP 86, 98-99. As Hasseries acknowledged however, she clearly understood such statements by Skald to be jokes rather than threats to Gunnlaugsdottir: "It was something that -- you know, a person would blow off steam. He was going through a lot at the time. So we would say it, we would laugh, and then we would move on." 1RP 86, 98-99. On another occasion, Hasseries "joke[d]" about killing herself and Gunnlaugsdottir by driving her car off a cliff. 1RP 96-98.

Moreover, Golding was not timid about telling Skald when she believed certain comments made by him crossed the line into inappropriate. 1RP 124-25. Golding acknowledged that she never told Skald that his alleged comments about killing Gunnlaugsdottir, including shooting her, were inappropriate. 1RP 124-25.

Given Skald's particular relationship with Hasseries and Golding, the fact that prior similar statements involving Gunnlaugsdottir's death were admittedly taken as jokes, and that neither woman told Skald that his comments were inappropriate, a reasonable person in Skald's position would not foresee that his comments about shooting Gunnlaugsdottir would be taken as a true expression of intent to kill Gunnlaugsdottir. Rather, from Skald's perspective, Hasseries and Golding could reasonably be counted on to understand that he was merely joking and venting his

irritation about his marriage and child custody dispute and not actually threatening Gunnlaugsdottir. That tensions between Skald and Gunnlaugsdottir may have been elevated at the time does not render the otherwise innocuous statement a true threat. See Williams, 144 Wn.2d at 209-10 (recognizing that speech does not necessarily fit under the “narrow category” of a “true threat” simply because it conveys anger).

Also significant is the fact that Hasseries and Golding provided inconsistent statements about whether they viewed Skald's comments as a true threat expressing an actual intent to kill Gunnlaugsdottir. 3RP 288-89; See State v. Alvarez, 74 Wn. App. 250, 260–61, 872 P.2d 1123 (1994) (evidence of subjective fear is a necessary but not sufficient component of the prosecution's proof), aff'd., 128 Wn.2d 1 (1995). Hasseries testified that "after a lot of time to reflect on it[.]" she believed Skald intended to kill Gunnlaugsdottir. 1RP 91-93. During an interview conducted less than three weeks earlier however, Hasseries acknowledged she was uncertain whether Skald had a true intent to harm Gunnlaugsdottir and thought it possible that he was "just blowing off steam[.]" 1RP 92-93. Similarly, Golding testified that she "truly [didn't] know[.]" whether Skald had a homicidal intent toward Gunnlaugsdottir or was just "blowing off steam[.]" 1RP 125-26.

Significantly, Hasseries did not report any of Skald's alleged statements about killing Gunnlaugsdottir to police until August 2016; more than a year after they were first made. Even then, Hasseries only contacted police at the urging of her therapist. 1RP 101-04. Despite questioning whether Skald's statements should be taken seriously, Golding never contacted police to report the statements herself. 1RP 125-28.

An independent review of these facts leads to the conclusion that Skald's comment to Hasseries and Golding about shooting Gunnlaugsdottir was not a true threat. "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more." Kilburn, 151 Wn.2d at 49. Reversal is required because the State failed to prove beyond a reasonable doubt that Skald made a true threat that was unprotected speech.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT SKALD OF FELONY HARASSMENT BECAUSE THE STATE FAILED TO PROVE THAT GUNNLAUGSDOTTIR WAS PLACED IN REASONABLE FEAR THAT SHE WOULD BE KILLED.

Skald's conviction for felony harassment should also be reversed and dismissed because the State failed to prove beyond a reasonable doubt that Skald's alleged threat to shoot Gunnlaugsdottir placed her in reasonable fear that she would be killed.

Due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, section 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368, (1970). Reversal is required when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found every element of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970)); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

RCW 9A.46.020 provides in relevant part:

- (1) A person is guilty of harassment if:
  - (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .
  - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . .
- (2) A person who harasses another ... is guilty of a class C felony if ... (b) the person harasses another person by threatening to kill the person threatened.  
...

To convict a person for felony harassment based on threats to kill, the State therefore has to prove beyond a reasonable doubt that the defendant (1) without lawful authority (2) knowingly threatened to kill some other person immediately or in the future, and (3) the defendant's words or conduct placed the person threatened in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b); State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (felony harassment statute requires victim to reasonably fear the threat *to kill* will be carried out, not just fear bodily injury will be inflicted) (emphasis added).

Here, the to-convict instruction for the third charged count of felony harassment required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or between January 1, 2015 and August 30, 2016, the defendant knowingly threatened to kill Asta Hanna Gunnlaugsdottir immediately or in the future;
- (2) That the words or conduct of the defendant placed Asta Hanna Gunnlaugsdottir in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority;  
and
- (4) That the threat was made or received in the State of Washington.

CP 30 (instruction 12).

As discussed in argument 1, supra, the prosecutor specifically relied on the threat to shoot Gunnlaugsdottir with a shotgun as the act the jury should rely on to find Skald guilty of the third felony harassment charge. 1RP 197, 205. In light of these jury instructions, and the prosecutor's election, the State was required to prove that Skald's alleged comment that he was going to shoot Gunnlaugsdottir with a shotgun, placed Gunnlaugsdottir in reasonable fear that she would be killed. Even when viewed in the light most favorable to the prosecution, the State failed to prove that Skald's alleged comment placed Gunnlaugsdottir in reasonable fear.

An objective standard is applied to determine whether the victim's fear that defendant's threat will be carried out is reasonable. State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000); State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). "This requires the jury to consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions." State v. Binkin, 79 Wn. App. 284, 292, 902 P.2d 673 (1995).

State v. C.G., is instructive. There, the Washington Supreme Court reversed C.G.'s conviction for felony harassment, holding that "[i]n order to convict an individual of felony harassment based on a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened

was placed in reasonable fear that the threat to kill would be carried out.” C.G., 150 Wn.2d at 612. C.G., a high school student, became angry and disruptive in class. The teaching assistant called the vice-principal, Tim Haney, who arrived and asked C.G. to leave with him. After some resistance, C.G. left, continuing to shout obscenities and stating, “I’ll kill you Mr. Haney, I’ll kill you.” Haney testified that C.G.’s threat caused him concern and based on what he knew about C.G., she might try to harm him or someone else. Id. at 606-07. The Supreme Court concluded that there was no evidence that Mr. Haney was placed in reasonable fear that C.G. would actually carry out her threat and kill him. Id. at 610.

Just as in C.G., the state here produced no evidence that Gunnlaugsdottir was placed in reasonable fear that Skald's alleged threat to shoot her with a shotgun would be carried out. Skald made the alleged statement in the presence of Hasseries and Golding. Skald never directly communicated the alleged threat to Gunnlaugsdottir. Nor did either woman who heard the alleged threat. Rather, Gunnlaugsdottir only "became aware of the things that the defendant [Skald] was saying" about her after speaking with the investigating police officer, David Shurick. 1RP 145. During that conversation, Shurick told Gunnlaugsdottir what he "had learned during [the] investigation." 1RP 112, 145-46. Significantly, neither Shurick nor Gunnlaugsdottir testified to the specific contents of

what information Shurick shared with Gunnlaugsdottir. 1RP 112, 145-46. Thus, the jury was never presented with evidence as to which of the three specific alleged threats to kill, if any, that Shurick relayed to Gunnlaugsdottir.

More importantly, Gunnlaugsdottir never said she feared that Skald would carry out any of his three alleged threats to kill, including shooting her with a shotgun. Gunnlaugsdottir testified only that she took what Skald had said "very" seriously. 1RP 145-46. Without any context as to which specific threats to kill Shurick relayed to Gunnlaugsdottir, the State cannot prove as it must that she was placed in reasonable fear that *the threat made is the one that will be carried out.* RCW 9A.46.020(1)(a)(i), (2)(b) (emphasis added).

There is also no evidence that Gunnlaugsdottir reasonably feared that Skald would carry out his threat to kill her on the date, and in the manner described. Skald allegedly threatened to shoot Gunnlaugsdottir in the courthouse parking lot with a shotgun when she returned to the United States for a scheduled court hearing on September 2, 2016. 1RP 86-87, 100, 121-22. As Gunnlaugsdottir acknowledged however, by the time she spoke with Shurick in late August, she already knew she was not going to be at the court hearing. 1RP 150. Skald had also never previously threatened to kill Gunnlaugsdottir with a shotgun or by any other means.



1RP 153. And while Skald had once hit Gunnlaugsdottir in the back during their marriage, there was no injury, and Skald was never again physical with her. 1RP 152; Compare State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999) (The victim's knowledge of the defendant's prior violence is relevant to question of reasonable fear).

Because the state presented no evidence to prove the reasonable fear element, the conviction should be reversed and dismissed.

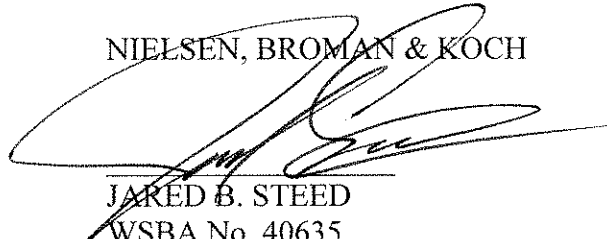
D. CONCLUSION<sup>2</sup>

For the reasons discussed above, this Court should reverse Skald's conviction for felony harassment for insufficient evidence. This Court should also exercise its discretion and deny appellate costs.

DATED this 22<sup>nd</sup> day of September, 2017.

Respectfully submitted,

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<sup>2</sup> RAP 14.2 now provides, with regard to appellate costs:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Skald indigent for purposes of the appeal. CP 70-74. That finding remains in effect.

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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